No. 12-56506

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSE LUIS MUNOZ SANTOS,
Petitioner-Appellant,

v.

LINDA R. THOMAS, WARDEN,
Respondent-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
DISTRICT COURT NO. CV 11-6330-MMM

GOVERNMENT'S RESPONSE TO PETITIONER'S PETITION FOR REHEARING AND/OR REHEARING EN BANC

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I

INTRODUCTION

The Mexican government firmly maintains that the evidence proffered in support of the extradition of Petitioner-Appellant Jose Luis Muñoz Santos (the "fugitive") was not procured by torture. And no court, either in the United States or Mexico, has found otherwise. To the contrary, the co-conspirator testimony in question was either made

under oath, in the presence of defense counsel, and preceded by the averment that it was made "with no coercion, physical or moral violence on the part of this office or on the part of the officers of the state police," or before a criminal court. The proffered evidence of torture is the self-serving recantations of the co-conspirators' confessions, which the co-conspirators now claim were coerced. The fugitive conceded below that the torture allegations are inextricably intertwined with these recantations and that evidence of recantations is wholly precluded from extradition proceedings. The fugitive acknowledged that resolving whether the confessions were coerced would require an evidentiary hearing (ER 266, 281),[1] which is prohibited under extradition law.

The fugitive's allegations that confessions were coerced are serious, but such allegations, when disputed, must be considered by the courts of the requesting country (here, Mexico), which have better access to the evidence, a greater ability to investigate the allegations

[1] "ER" refers to petitioner's Excerpts of Record; "PFR" refers to petitioner's Petition for Rehearing and/or Rehearing *En Banc*; "GAB" refers to the Government's Answering Brief; "AB" refers to the *Amici Curiae's* Brief in Support of the Petition for Rehearing; each is followed by the applicable page number.

fully, as well as an understanding of the applicable laws and rules of criminal procedure governing receipt of such evidence in their judicial system, rather than by the courts of the requested country operating in a limited extradition context. Extradition courts are legally barred from resolving such evidentiary disputes, and principles of separation of powers and international comity underscore why that bar makes sense. The panel's decision affirming the exclusion of disputed evidence, *Santos v. Thomas*, 779 F.3d 1021, 1023 (9th Cir. 2015), was correct, dictated by Supreme Court and Ninth Circuit precedent, and does not meet the Rule 35 criteria justifying rehearing *en banc*.

II

STATEMENT OF FACTS

In May 2006, the United States initiated extradition proceedings on behalf of Mexico, alleging that, in August 2005, the fugitive planned and participated in the kidnapping for ransom of a woman and her two young daughters, which resulted in the death of one of the daughters.[2]

[2] While the extradition case was pending, the fugitive successfully challenged the homicide charge in Mexican courts, and the Mexican government amended its extradition request to include only the kidnapping charge. (ER 28.)

A. The Extradition Hearing and Probable Cause Findings

United States Magistrate Judge Andrew J. Wistrich (the "extradition judge") held an extradition hearing on April 19, 2011 (ER 27), and issued a Certification of Extraditability and Order of Commitment on June 13, 2011 (ER 68). In his certification order, the extradition judge admitted and credited the five witness statements proffered by the government to demonstrate probable cause. (ER 34); *Santos*, 779 F.3d at 1023 (noting that certification was based upon five statements). Those statements came from the fugitive's alleged co-conspirators, Jesus Servando Hurtado Osuna ("Hurtado") and Fausto Librado Rosas Alfaro ("Rosas"); the adult kidnapping victim and mother of the two child victims, Dignora Hermosillo Garcia ("Hermosillo"); Hermosillo's husband, Roberto Castellanos Meza ("Castellanos"); and a person who was approached to join the kidnapping conspiracy but declined, Benigno Andrade Hernandez ("Andrade"). (ER 34-45.)[3]

Hermosillo provided a sworn statement that on August 18, 2005, she and her two minor daughters were kidnapped from their home in

[3] Contrary to the fugitive's assertion (PFR 3), the government did not proffer the statements alleging torture in its extradition request.

Mexico by an armed, masked man. (ER 36.) Hermosillo saw parts of the kidnapper's face as he drove away from the house. (*Id.*) The kidnapper later stopped the car to leave one of the daughters, bound, by the side of the road and made a second stop to abandon the second daughter as well.[4] (*Id.*) After obtaining Hermosillo's bank card and the phone number for Hermosillo's husband, the kidnapper left Hermosillo, still bound, by the side of the road at a third location. (ER 36-37.) Hermosillo eventually freed herself and contacted her husband. (ER 37.) Hermosillo gave a second sworn statement in which she identified a photograph of Rosas "without any doubt" as her kidnapper. (*Id.*)

Hurtado provided a sworn statement in which he implicated in the kidnapping scheme himself, the fugitive, Rosas, and another man and woman who were not charged in connection with the offense. (ER 39-41.) Hurtado further stated that he was making the statement "in the presence of my public defender, with no coercion, physical or moral violence on the part of this office or on the part of the officers of the

[4] One of the girls died before she could be rescued, and her death was the basis for the homicide charge that was subsequently dismissed by the Mexican court. (ER 28.) The other girl survived. (ER 75.)

state police." (ER 41.) Rosas submitted a signed statement, made before a criminal court judge, in which he admitted to kidnapping the victims and implicated the fugitive, Hurtado, and others in the scheme. (ER 42-45.)

Andrade voluntarily appeared before a prosecutor and gave a sworn statement that the fugitive and Rosas asked Andrade to participate in "pulling a 'job'" that involved asking "Beto"—Hermosillo's husband—for two million pesos, but Andrade declined to participate. (ER 38.)

The extradition judge concluded that Rosas and Hurtado "gave detailed statements inculpating themselves and [the fugitive] in the planning and execution of the kidnapping. The . . . statements of Rosas and Hurtado are competent evidence and contain indicia of reliability." (ER 45.) Among other indicia of reliability, the extradition judge noted that Rosas and Hurtado reported several consistent facts about the execution of the crime; Hurtado's statement was sworn and he was assisted by counsel when he gave it; Rosas made his statement before a criminal court judge; and Andrade's statement contained facts that corroborated facts recounted by Rosas and Hurtado. (ER 45-50.)

B. The Fugitive Attempts to Introduce Disputed Evidence

The fugitive sought to introduce evidence that, among other things, "the inculpatory statements made by Rosas and Hurtado . . . were obtained by torture . . . ; [] Rosas and Hurtado subsequently recanted those inculpatory statements; and [] the recantations are more reliable than the inculpatory statements." (ER 53.) The extradition judge excluded this evidence on the ground that the fugitive's "proposed witnesses' testimony is offered to contradict the version of the facts set forth in the inculpatory statement and to provide a competing, conflicting version of the facts." (ER 64.)

C. The Panel Held That the Extradition Judge Did Not Abuse His Discretion in Excluding Disputed Evidence That Was Inextricably Intertwined with Recantations

After the extradition judge certified the fugitive as extraditable, the fugitive filed a Petition for a Writ of Habeas Corpus ("Habeas Petition") in which, in pertinent part, the fugitive challenged the extradition judge's exclusion of the torture allegations. (ER 3.) The district court denied the Habeas Petition (ER 26), and the fugitive appealed that decision to this Court. The undivided panel (Judge Nguyen, writing, joined by Judge Schroeder and visiting Judge

Zouhary) affirmed denial of the Habeas Petition, holding that the extradition judge was within his discretion to exclude the disputed torture allegations because they were inextricably intertwined with recantation evidence. *Santos*, 779 F.3d at 1027-28. The panel noted that "[u]nder the appropriate circumstances, an extradition court *may* exercise its discretion to consider allegations of torture," though not where "consideration [of the evidence] would require a mini-trial." *Id.* at 1027. Here, the circumstances did not *compel* the judge to consider the disputed allegations. *Id.* The panel based this holding on a thorough review of extradition precedent, *id.* at 1024-26, including *Barapind v. Enomoto*, 400 F.3d 744 (9th Cir. 2005) (*en banc*), which made clear that "extradition courts do[] not weigh conflicting evidence in making their probable cause determinations." *Id.* at 749-50 (internal quotation marks omitted).

III

ARGUMENT

A. The Panel Properly Affirmed the Extradition Judge's Exclusion of the Fugitive's Recantation Evidence

1. The Extradition Habeas Process Is Sharply Limited By Precedent, Statute, Treaty, and Separation of Powers and Comity Principles

The extradition process begins with the political branches' decision to enter into an extradition treaty, a decision that rests on those branches' determination that the foreign country's legal and penal system is one into which the United States is willing to extradite fugitives. "[I]t is for the[se] political branches, not the judiciary, to assess practices in foreign countries and to determine national policy in light of those assessments." *Munaf v. Geren*, 553 U.S. 674, 700-01 (2008). As the Supreme Court recently explained:

> The Judiciary is not suited to second-guess such determinations—determinations that would require federal courts to pass judgment on foreign justice systems and undermine the Government's ability to speak with one voice in this area. . . . In contrast, the political branches are well situated to consider sensitive foreign policy issues, such as whether there is a serious prospect of torture . . . .

Id. at 702. The political branches do not lightly enter into extradition treaties, and once they do, reciprocal obligations and principles of comity follow.

One of those obligations—reflecting an important comity principle and codified in 18 U.S.C. §§ 3181-3195—is that "judicial officers conduct a circumscribed inquiry in extradition cases." *Blaxland v. Commonwealth Dir. of Pub. Prosecutions*, 323 F.3d 1198, 1208 (9th Cir. 2003). Extradition judges do not hold trials on the fugitive's guilt, or resolve evidentiary challenges, or look past the evidence to whether the legal procedures in the requesting country are akin to those of the United States. "It is not the business of [United States] courts to assume the responsibility for supervising the integrity of the judicial system of another sovereign nation." *Jhirad v. Ferrandina*, 536 F.2d 478, 484-85 (2d Cir. 1976). As the Second Circuit explained with some force in the context of a fugitive's claims that he would be tortured if extradited to the requesting country, "consideration of the procedures that will or may occur in the requesting country is not within the purview of a [U.S. court]." *Ahmad v. Wigen*, 910 F.2d 1063, 1066 (2d Cir. 1990). In fact, it is "improper" for the court to make that sort of

examination: "[t]he interests of international comity are ill-served by requiring a foreign nation such as [Mexico] to satisfy a United States [court] concerning the fairness of its laws and the manner in which they are enforced." *Id.* at 1067. The same concerns counsel against U.S. judges conducting inquiries into the manner in which evidence has been obtained in a foreign country. *See Koskotas v. Roche*, 931 F.2d 169, 174 (1st Cir. 1991) ("Extradition proceedings are grounded in principles of international comity, which would be ill-served by requiring foreign governments to submit their purposes and procedures to the scrutiny of United States courts."). It is for the courts in the requesting country to determine whether law enforcement agents in that country have procured evidence improperly and, if so, whether any impropriety so taints the evidence that it should not be considered in the underlying judicial proceedings.

Thus, an extradition judge may not deny extradition on the ground that the requesting country will not provide a fugitive the procedures and rights available in a U.S. criminal case, even if those rights are guaranteed under the U.S. Constitution. *Neely v. Henkel*, 180 U.S. 109, 123 (1901). Nor may a judge entertain challenges that a

requesting country has not followed its own laws in bringing a criminal case or extradition request. *Skaftouros v. United States*, 667 F.3d 144, 155-56 (2d Cir. 2011). As the Supreme Court explained over a century ago—in a far more difficult case than this one—U.S. courts "are bound by the existence of an extradition treaty to assume that the [foreign] trial will be fair." *Glucksman v. Henkel*, 221 U.S. 508, 512 (1911) (extradition of Jewish fugitive to tsarist Russia); *cf. Munaf*, 553 U.S. at 700-02; *Trinidad y Garcia v. Thomas*, 683 F.3d 952, 978 (9th Cir. 2012).

2. U.S. Courts Must Exclude Evidence That Contradicts the Extraditing Country's Proffered Evidence

Under the Extradition Treaty Between the United States and Mexico, signed May 4, 1978, 31 U.S.T. 5059, to meet the standard for certification, the evidence must only establish probable cause that the fugitive committed the charged offense. *See, e.g.*, *Emami v. U.S. Dist. Court for N. Dist.*, 834 F.2d 1444, 1447 (9th Cir. 1987). Moreover, "[t]his circuit has held that the self-incriminating statements of accomplices are sufficient to establish probable cause in an extradition hearing." *Zanazanian v. United States*, 729 F.2d 624, 627 (9th Cir. 1984).

An extradition hearing resembles a preliminary hearing or grand jury investigation into the existence of probable cause, *see, e.g.*, *Benson v. McMahon*, 127 U.S. 457, 463 (1888) (an extradition hearing is "of the character of [a] preliminary examination" to determine whether to hold an accused to be tried on criminal charges), except that a fugitive's procedural rights are more limited, *see, e.g.*, *Bingham v. Bradley*, 241 U.S. 511, 517 (1916) (no right to cross-examination if witnesses testify at the hearing); *Eain v. Wilkes*, 641 F.2d 504, 511 (7th Cir. 1981) (no right to introduce contradictory or impeaching evidence). Because of the limited purpose of an extradition hearing and the comity owed other nations under an extradition treaty, a fugitive's ability to present evidence is very limited. In *Collins v. Loisel*, the Supreme Court held that a fugitive's right to present evidence must be sharply limited lest an extradition hearing become a contested trial:

> If this were recognized as the legal right of the accused in extradition proceedings, it would give him the option of insisting upon a full hearing and trial of his case here; and that might compel the demanding government to produce all its evidence here, both direct and rebutting, in order to meet the defense thus gathered from every quarter. The result would be that the foreign government though entitled by the terms of the treaty to the extradition of the accused for the purpose of a trial where the crime was committed, would be compelled to go into a full trial on the merits in a foreign

> country, under all the disadvantages of such a situation, and could not obtain extradition until after it had procured a conviction of the accused upon a full and substantial trial here. This would be in plain contravention of the intent and meaning of the extradition treaties.

259 U.S. 309, 316 (1922). The Court further explained that evidence offered to "contradict" the government's evidence was not properly admitted under this standard. *Id.*

For that reason—and "[b]ecause extradition courts do not weigh conflicting evidence in making their probable cause determinations," *Barapind*, 400 F.3d at 749 (internal quotation marks and citation omitted)—a fugitive may not introduce evidence that contradicts the evidence submitted on behalf of the requesting country. In other words, the fugitive cannot offer evidence that would lead to an evidentiary dispute. *See Hooker v. Klein*, 573 F.2d 1360, 1368 (9th Cir. 1978). As the fugitive concedes (PFR 7), this includes evidence of recantations of inculpatory statements. *See Barapind*, 400 F.3d at 750; *Eain*, 641 F.2d at 511-12 ("The alleged recantations are matters to be considered at the trial, not the extradition hearing.").

Only precluding evidentiary disputes can maintain the essential nature of extradition hearings, defined by the preliminary nature of the

proceeding, the practical fact that the relevant evidence and witnesses are located abroad, and the need for comity between the Treaty parties. To resolve disputed issues would compel the requesting country to send its evidence and witnesses to the United States, and requiring "the demanding government to send its citizens to another country to institute legal proceedings would defeat the whole object of the treaty." *Charlton v. Kelly*, 229 U.S. 447, 461 (1913); *Bingham*, 241 U.S. at 517; *Mainero v. Gregg*, 164 F.3d 1199, 1206 (9th Cir. 1999) ("[T]he very purpose of extradition treaties is to obviate the necessity of confronting the accused with the witnesses against him.") (internal quotation marks omitted).

3. The Torture Allegations Are Inextricably Intertwined With Recantation Evidence and Were Properly Excluded

While the fugitive now asserts that the torture allegations may be considered separately from the recantations (PFR 7, 12), he conceded below "that the district court correctly characterized the evidence as 'inextricably intertwined,' and that Rosas and Hurtado are essentially saying, 'I was tortured so the things I said the first time are not

credible.'" *Santos*, 779 F.3d at 1027; (ER 15). The panel thus correctly held that the extradition judge properly excluded all such evidence:

> [I]n order to evaluate Rosas' and Hurtado's torture allegations, the extradition court would necessarily have had to evaluate the veracity of the recantations and weigh them against the conflicting inculpatory statements. Doing so would have exceeded the limited authority of the extradition court.

Santos, 779 F.3d at 1027 (citing *Barapind*, 400 F.3d at 749-50; *Quinn v. Robinson*, 783 F.2d 776, 815 (9th Cir. 1986)).

The fugitive contends that *Barapind* supports his position that the recantations and torture allegations can be detached from each other.[5] (PFR 10-12.) He relies on a sentence in which the Court *rejected* the fugitive's argument that some evidence was unreliable "because it was fabricated or obtained by torture," but also (1) commented that the extradition judge had "conducted a careful, incident-by-incident analysis as to whether there was impropriety" on the part of the requesting government, and (2) held that the judge's findings that

[5] The fugitive cites the panel's decision in *Barapind* (PFR 11), but that decision "shall not be cited as precedent by or to this court . . . , except to the extent adopted by the *en banc* court," *Barapind v. Enomoto*, 381 F.3d 867 (9th Cir. 2004), and the *en banc* court did not adopt any of it, *see Barapind*, 400 F.3d at 744.

evidence supporting certain charges "was not the product of fabrication or torture were not clearly erroneous." (PFR 10 (quoting *Barapind*, 400 F.3d at 748).) Read in context, that sentence cannot carry the tremendous weight the fugitive asks it to bear.

To begin with, the *Barapind* Court was never asked whether evidence allegedly obtained under duress could be excluded. The extradition judge in *Barapind* admitted and considered such evidence, but nonetheless found probable cause on both charges without regard to Barapind's evidence because resolution of that disputed evidence would require an improper trial. 400 F.3d at 749, 752. Barapind appealed that probable cause finding, and the government never challenged the admission of the torture evidence. The question of whether the extradition judge was required to admit and consider such evidence simply was not before the Court. *See Webster v. Fall*, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.").

More importantly, *Barapind* did not—and could not—upend the decades of precedent, including Supreme Court precedent, holding that

a fugitive cannot submit contradictory evidence and an extradition judge cannot hold mini-trials to resolve evidentiary disputes. Thus, the panel in this case—after carefully analyzing *Barapind*—properly held that the decision required affirmance here. *Santos*, 779 F.3d at 1025-28. The fugitive's "evidence was properly excluded because its consideration would require a mini-trial on whether the initial statements of Rosas and Hurtado were procured by torture." *Id.* at 1027-28 (citing *Barapind*, 400 F.3d at 749-50).

4. Mexico Disputes the Fugitive's Torture Allegations

The Mexican government maintains that Hurtado and Rosas were not tortured (ER 16 (habeas judge noting proffer by government counsel that the claims of torture were unfounded)) and, notwithstanding the conclusory assertions of the fugitive (PFR 1) and *amici curiae* (AB 2, 3 n.4), there has never been a judicial finding to the contrary.[6] Rather,

[6] The fugitive's assertion that Mexico does not contest the allegations of torture (PFR 15) is false. (*See* ER 16.) Furthermore, the fugitive's argument that Mexico has not proffered evidence outside of the record to refute the fugitive's allegations "[i]n the nearly 9 years it has had to do so" (PFR 4) violates basic "Hornbook law that neither party can rely on evidence outside the record of the case on appeal." *Duran v. United States*, 413 F.2d 596, 605 (9th Cir. 1969).

the only evidence of torture in the record are Rosas's and Hurtado's self-serving allegations that their inculpatory statements were coerced. *See Santos*, 779 F.3d at 1026 n.4 (noting that Rosas and Hurtado had incentives to falsely recant).

The allegations of torture were properly excluded because they contradicted evidence proffered by the government and would have created an evidentiary dispute, independent of the torture allegations being inextricably intertwined with the recantations. (*See* GAB 31-36 (citing *Hooker*, 573 F.2d at 1368; *Barapind*, 400 F.3d at 749-50).) The panel, however, did not reach this broader question and instead expressly limited its holding to requiring the exclusion of evidence of duress when such evidence is inextricably intertwined with recantations. *Santos*, 779 F.3d at 1028 n.5.

5. The Fugitive's Torture Allegations Are Properly Considered by Mexican Courts

The responsibility for addressing the fugitive's torture allegations properly rests with Mexican, not U.S., courts. In addition to the well-established case law recognizing that the courts of the requesting country, with full access to the necessary evidence and witnesses, are better qualified to consider the fugitive's allegations, comity between

Treaty partners counsels deference. Consistent with the determination previously made by the Executive and Legislative branches, the Mexican legal system can be relied on to adjudicate the fugitive's claims fairly. Indeed, Mexican courts already granted the fugitive relief on the homicide charge that was originally brought against him. (*See* ER 28.) There is no reason to believe that the Mexican courts cannot fairly examine the allegations concerning the co-conspirators' statements.

B. The Panel Decision Does Not Conflict With Precedent

The fugitive contends that the panel's decision conflicts with the Supreme Court's decision in *Collins* and this Court's *en banc* decision in *Barapind*. (PFR 1.) As explained above, however, those decisions unambiguously support the government's position as they hold that an extradition judgment must exclude evidence that contradicts evidence proffered by a foreign country seeking extradition. *Collins*, 259 U.S. at 316; *Barapind*, 400 F.3d at 749. Moreover, the panel noted that *Barapind* is consistent with other circuits. *Santos*, 779 F.3d at 1026 n.2.

In addition, because there has not been a finding that any statements were procured through torture, this case does not present a

matter of exceptional importance and *en banc* review is unwarranted.

Fed. R. App. P. 35(a).[7]

[7] The Brief of the American Civil Liberties Union, American Civil Liberties Union of Southern California, Center for Constitutional Rights, Human Rights First, and Human Rights Watch as *Amici Curiae* in Support of the Petition for Rehearing, raises, for the first time, legal arguments concerning the treaty obligations of the United States - with respect to extradition proceedings. These arguments were never raised by the fugitive below or before the panel, and they have not been adopted by the fugitive even in his *en banc* petition. The Court therefore should not consider them. *Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169, 1177 n.8 (9th Cir. 2009) ("An *amicus curiae* generally cannot raise new arguments on appeal and arguments not raised by a party in an opening brief are waived.") (citation omitted); *Artichoke Joe's Cal. Grand Casino v. Norton*, 353 F.3d 712, 719 (9th Cir. 2003) ("In the absence of exceptional circumstances . . . we do not address issues raised only in an *amicus* brief."); 16AA Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction § 3975.1 (4th ed. 2008) ("In ordinary circumstances, an amicus will not be permitted to raise issues not argued by the parties.").

IV

CONCLUSION

The panel correctly resolved this case according to controlling Supreme Court and Ninth Circuit precedent. The panel's holding creates no inconsistency within the Court nor does it conflict with any other circuit. For the reasons set forth above, the Court should deny the fugitive's petition.

DATED: July 27, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that:

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2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Century Schoolbook) using Microsoft Word 2010.

DATED: July 27, 2015

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9th Circuit Case Number(s) 12-56506

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When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) Jul 27, 2015 .

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature (use "s/" format) s/ Aron Ketchel

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CERTIFICATE OF SERVICE
When Not All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) .

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Signature (use "s/" format)